JD–94–16
Ravenswood, WV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC

and **CASE 09-CA-116410**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 5668

Zuzana Murarova, Esq., for the General Counsel.
Mr. Kevin Gaul, for the Charging Party.
Daniel P. Bordoni, Esq. **and** ***David R. Broderdorf, Esq.***
(Morgan, Lewis & Bockius, LLP), of Washington, D.C.,
for the Respondent.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. The General Counsel alleged that the Respondent discharged an employee for misconduct during the course of protected activity and that the misconduct was not so egregious as to forfeit the Act's protection. Finding no course of protected activity, I conclude that the discharge was lawful.

Procedural History

This case began on November 5, 2015, when the Union, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5668 (the Charging Party or the Union), filed an unfair labor practice charge against the Respondent, Constellium Rolled Products Ravenswood, LLC. Region 9 of the National Labor Relations Board docketed the charge as Case 09–CA–116410 and conducted an investigation.

On May 23, 2016, the Regional Director for Region 9, acting with authority delegated by the Board's General Counsel, issued an Order consolidating complaint, compliance specification, and notice of hearing. The Respondent filed a timely answer.

On July 26, 2016, a hearing opened before me in Ripley, West Virginia. The parties presented evidence on that day and the next. Then, I adjourned the hearing until September 6, 2016, when it resumed by telephone conference call. After oral argument by the parties' counsel, the hearing closed.

Admitted Allegations

Based on admissions in the Respondent's answer to the complaint, I find that the General Counsel has proven the allegations raised in complaint paragraphs 1, 2(a), 2(b), 2(c), 3, 4, 5(a), and 5(b).

More specifically, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act, and that it filed the unfair labor practice charge on November 5, 2013, and served it on the Respondent on November 6, 2013.

Additionally, I find that the Respondent is a limited liability company engaged in the manufacture of rolled aluminum, and operates a facility in Ravenswood, West Virginia. Further, I conclude that the Respondent satisfies the statutory and discretionary standards for the exercise of the Board's jurisdiction.

Based on the Respondent's admissions, I find that the following individuals are its supervisors within the meaning of Section 2(11) and its agents within the meaning of Section 2(13) of the Act: Director of Human Resources Martin J. Lucki III,[1] Senior Human Resources Business Partner Tim Carro, Human Resources Business Partner Ben Guillow, Unit Manager Tim Domico, Maintenance and Engineering Manager Mark Harmison, and Hotline Maintenance Supervisor Shawn Paugh.

The Respondent admits, and I find, that it suspended employee Andrew "Jack" Williams on about October 10, 2013, and discharged Williams on about October 22, 2013.

The Respondent denies that it suspended and discharged Williams because he engaged in concerted activities protected by the Act, and to discourage other employees from doing so. It also denies that its suspension and discharge of Williams constituted unfair labor practices affecting commerce.

The Facts

The Union represents a unit of the Respondent's employees. It had entered into an agreement with the Respondent concerning how employees would be selected to perform overtime work. When that agreement expired the parties tried to negotiate a new one but could not agree on its terms. The Respondent declared that the parties had reached impasse and unilaterally implemented a new overtime scheduling system.

[1] Alleged in the complaint as Martin J. Lucid III and hereby corrected.

The Union protested by filing an unfair labor practice charge and a number of employees filed grievances. The Board deferred action on the charge to the parties' grievance arbitration procedure.

Under the Respondent's unilaterally imposed overtime procedure, an employee wishing to work overtime the following week placed his name on a posted sign-up sheet. A signer who then was offered overtime but refused it could receive an adverse point under the Respondent's attendance policy. Thus, the procedure required an employee to foresee whether circumstances would allow him to work overtime the following week, and placed the employee at some risk if circumstances changed. Employee Michael Matheny testified:

> Q. And what's your understanding of what that change was?
> A. That change was they wanted us to give them 7 days out. If I was going to sign up for overtime, I'd have to sign up 7 days. Now, I don't know what's going to happen these 7 days later, because I didn't have the option of backing out without receiving a point.

In addition to filing grievances, some employees decided to protest the new procedure by refusing to sign up. Matheny testified that he had gone 14 months without working any overtime.

Some tension arose between the employees boycotting the sign-up sheet and other employees who used it, thus undermining the boycott. Those opposed to the new system began calling the sign-up sheet a "whore board," implying that those who signed it had sold out.

Employee Williams was one of the boycotters. He testified, in effect, that he regarded anyone who signed up to work overtime as being a "company whore." On October 2, 2013, Williams wrote "whore board" at the top of the posted sign-up sheet.

That sign-up sheet, which is in evidence, indicates that 3 employees, Robert Lawson, Tim Snodgrass, and Lewis Watson, had applied to work overtime. Williams believed, but was not absolutely sure, that the 3 employees already had signed the sheet when he wrote "whore board" at the top of it.[2]

Williams also expressed his views about the new overtime procedure when talking with other employees, and not all of them welcomed his comments. The record indicates that this topic of conversation became contentious.

When the words "whore board" appeared on the sign-up sheet, management decided to investigate. Management representatives, along with a union committeeman, conducted

[2] The sign-up sheet actually consisted of 2 pieces of paper and Williams wrote the words "whore board" at the top of each. Together, the two sheets list the names of 34 employees, presumably all workers affected by the new overtime procedure. To the right of each name appear boxes for each day of the following work week. An employee "signed up" by noting in the appropriate box how many hours of overtime he was willing to work on that particular date. Of the 34 employees on the list, 31 have first names customarily used only by men. Three have names—Bobby, Shannon, and Terry—which arguably might belong to either a man or woman.

interviews with individual employees. Management also reviewed surveillance camera recordings, which established that Williams had been the one who defaced the sign-up sheet.

On October 8, 2013, management representatives,[3] along with union committeeman Randy Beegle, met with Williams, who ultimately admitted writing "whore board" on the sign-up sheet. Maintenance and Engineering Manager Mark Harmison told him not to do it again.

The next day, Manager Harmison spoke with employee Robert Lawson about the effects of the meetings with employees. Harmison asked Lawson if he had experienced any further harassment. According to Harmison, Lawson replied that the harassment had "gotten 100 times worse" and identified Williams as one of those responsible.

On October 10, 2013, the Respondent, following its standard procedure, suspended Williams with the intent to discharge him. In accordance with that procedure, it conducted a meeting at which Williams and his union representative could argue against Williams being discharged. On October 22, 2013, the Respondent terminated Williams' employment.

In addition to filing the unfair labor practice charge, the Union also filed a grievance concerning Williams' discharge. On April 29, 2014, Arbitrator Charles W. Kohler conducted a hearing. On September 16, 2014, the arbitrator issued an award.

The arbitrator held that Williams had engaged in misconduct warranting discipline, but not sufficient to justify discharge. He ordered the Respondent to reinstate Williams, but without backpay. Additionally, as a condition of reinstatement, the arbitrator required Williams to sign an agreement promising not to repeat the conduct for which he was disciplined. The arbitration award described the specific terms to be included in that agreement:

> Grievant shall be reinstated on the condition that he signs a written agreement stating that he will not engage in any type of conduct designed to undermine the Employer's overtime procedure. The prohibited conduct includes, but is not limited to, conduct meant to harass, intimidate or otherwise annoy those employees who sign up for overtime. He must also agree to comply with any posted anti-harassment policy. If he violates any terms of the agreement within one year after his reinstatement, the Company shall have the right to discharge him. If Grievant appeals a discharge for violating the reinstatement agreement, the only issue before the arbitrator will be whether he engaged in the alleged conduct. If the arbitrator finds that the grievant engaged in the alleged conduct, the discharge must be upheld.

On September 22, 2014, Williams signed an agreement which included the specified language, and the Respondent reinstated him. Williams remained employed by the Respondent when he testified in this proceeding on July 26, 2016.

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[3] Based on Williams' testimony, I find that the following management representatives attended the meeting: Senior Human Resources Representative Tim Carroll, Human Resources Representative Ben Guillow, and Maintenance and Engineering Manager Mark Harmison.

The General Counsel argues that Williams was engaged in protected activity when he wrote "whore board" on the sign-up sheet and that he did not forfeit the Act's protection by using the word "whore." The government also contends that even if Williams made comments to other employees about the Respondent's overtime policy, such remarks would constitute concerted activity protected by the Act.

The Respondent argues that the Board should defer to the arbitrator's decision that Williams should be reinstated but without backpay. The General Counsel opposes deferral.

Deferral to Arbitration

In determining whether deferral to arbitration is appropriate, I first must decide which standards to follow. In *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014), the Board overruled the criteria established in previous cases and announced new standards it would apply in the future. However, the Board concluded that injustice would result if it applied the new standards retroactively and therefore did not.

Arbitrator Kohler issued his award 3 months before the Board announced the new standards it would apply prospectively. Because *Babcock & Wilcox* is not retroactive, I will follow the Board precedents in effect at the time of the arbitrator's decision.

Under these precedents—and unlike the new *Babcock & Wilcox* framework[4]—the party *opposing* deferral bore the burden of showing that deferral was inappropriate. Moreover, the Board stated that

> [T]his burden is a heavy one, and the Board will not lightly set aside an arbitrator's resolution of an unfair labor practice issue where the contractual issue was factually parallel, and the arbitrator was presented generally with the facts relevant to the unfair labor practice issue.

Kvaerner Philadelphia Shipyard, 346 NLRB 390, 391 (2006), citing *Aramark Services, Inc.*, 344 NLRB 549 (2005).

Under the pre-*Babcock* standards, the Board evaluated the appropriateness of deferral using a four-part test. It would defer to an arbitration award when the arbitration proceedings appeared to have been fair and regular, all parties had agreed to be bound, the arbitrator had adequately considered the unfair labor practice issue that the Board is called on to decide, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Shands Jacksonville Medical Center, Inc.*, 359 NLRB 918 (2013), citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Raytheon Co.*, 140 NLRB 883, 884–885 (1963).

In the present case, no party disputes that the proceedings were fair and regular and that the parties had agreed to be bound by the arbitrator's decision. Both the Union and the Respondent

[4] In *Babcock & Wilcox* the Board stated, "We agree that the burden of proving that deferral is appropriate is properly placed on the party urging deferral." 361 NLRB No. 132, slip op. at 2.

fully participated in the arbitration hearing and submitted posthearing briefs. Nothing in the present record suggests any unfairness or irregularity in the arbitration proceedings. Accordingly, I find that the first two criteria have been satisfied.

The third criterion for deferral requires that the arbitrator has adequately considered the unfair labor practice issue. The General Counsel contends that Arbitrator Kohler did not.

As the General Counsel stated during oral argument, an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, 268 NLRB 573, 574 (1984).

During oral argument, the General Counsel asserted that "the arbitrator was not presented with the facts relevant to the unfair labor practice" and that the only issue considered by the arbitrator was whether Williams had been discharged for "just cause." The government further argued:

> There was also no mention at all of protected concerted activity or union activity in the arbitration transcript and no testimony about the concerted nature of the "whore board" name or the employees' protests over the overtime policy. The arbitrator was not informed that there was an unfair labor practice pending regarding Williams's discharge, and there was no mention of the charge in the arbitrator's decision. The arbitrator did not hear testimony about the concerted nature of Mr. Williams's conduct. He did not hear Mr. Matheny's testimony about his own use of the term "whore board" or any other employee's use of that term.

Without this evidence about the employees' concerted activities, the arbitrator could not have decided the unfair labor practice issue, the General Counsel argues, citing *Phil Smidt & Son, Inc.*, 260 NLRB 668 (1982). In that case, the Board stated "We agree with the Administrative Law Judge's finding that deferral to the arbitrator's decision would be inappropriate because the unfair labor practice issue in this case was not presented to the arbitrator nor considered or decided by him." 260 NLRB 668 at fn. 1. It appears, therefore, that the Board adopted in full the judge's extensive analysis, which the judge summarized as follows:

> In short, the arbitrator's analysis in this case whether reasons offered by Respondent provided "just cause" for its action—does not neatly fit into the analysis the Board must make in deciding whether a discharge, admittedly made for an allegedly unlawful reason, violates the Act. Thus, the arbitrator was not presented with, nor did he consider or decide, the unfair labor practice issue in this case.

260 NLRB at 671. The logic of *Phil Smidt & Son* appears to be unassailable and this precedent is squarely on point. However this 1982 case must be considered in light of more recent cases. Although the Board did not change the wording of the four-part test, its interpretations of those words has developed over time.

In 2005, the Board stated that it "strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues" and that:

> [W]here parties have agreed to be bound to an arbitrator's resolution of an issue, the Board will defer to that resolution except in those rare cases in which the arbitrator's decision is "palpably wrong." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085 (2003), enfd. 99 Fed. Appx. 223 (D.C. Cir. 2004).
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> The burden is on the party opposing deferral to show that the arbitrator's decision is palpably wrong; the party must show that it is clearly repugnant to the Act and not susceptible to an interpretation consistent with the Act. *Martin Redi-Mix*, 274 NLRB 559 (1985). . Thus, even where the Board would reach a different conclusion than that of the arbitrator, deferral is appropriate if the arbitrator's conclusion is susceptible to an interpretation consistent with Board law.

Kvaerner Philadelphia Shipyard, 347 NLRB at 391. Moreover, the Board has held that the arbitrator need not specifically state that he addressed the unfair labor practice issue. Similarly, the language in the arbitrator's award neither must be couched in terms of the statutory standard nor be totally consistent with Board law, so long as it is susceptible to an interpretation consistent with the Act. *Hertz Corp.*, 326 NLRB No. 96 (1998), citing *Motor Convoy, Inc.*, 303 NLRB 135–137 (1991).

These standards, as the Board had developed them by September 16, 2014, the date of the arbitrator's decision, strongly favored deferral. Yet, the Board had never specifically overruled *Phil Smidt & Son*, above, or eliminated the requirement that the arbitrator must adequately have considered the unfair labor practice issue that the Board is called on to decide.

Based on the arbitral award and related documents, it is difficult to conclude either that the parties presented Arbitrator Kohler with the statutory issue or that he considered it in reaching his decision, which focused exclusively on whether just cause existed to discharge Williams. Significantly, the arbitrator did not consider whether Williams' actions which resulted in his discharge constituted protected activity.

Although the arbitrator found that Williams had engaged in misconduct when he wrote "whore board" on the sign-up sheet, he never addressed the issue at the core of the unfair labor practice case, namely, whether the misconduct occurred in the course of protected activity. This issue is so central to the General Counsel's theory of violation that the arbitrator's failure to recognize or discuss it strongly supports a finding that the parties never presented him with the unfair labor practice issue.

Additionally, deferral will not be appropriate if the arbitrator's decision is clearly repugnant to the Act. The Board has held that an arbitral award is clearly repugnant to the Act if it is "palpably wrong," which is to say that it is "not susceptible to an interpretation consistent with the Act." *Motor Convoy, Inc.*, above.

Here, the arbitrator's decision is not susceptible of any interpretation consistent with the Act because it treats activity protected by Section 7 as misconduct which the Respondent could punish. The following portions of the arbitral award are particularly relevant:

> On the day after the interviews, Lawson walked into the employee lunchroom. He saw a group of employees, including Grievant, sitting together. Lawson overheard the employees criticizing the overtime procedure. He heard Grievant state that he intended to keep referring to those employees who signed up for the overtime as "company whores." Lawson heard another employee, Curtis Miller, state that there would be no problem if "some people weren't so damned sensitive."
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> Lawson reported the incident to management. After hearing about statements that the Grievant allegedly made in the lunchroom during Lawson's presence, management decided that the Grievant had disobeyed the Company's earlier instructions to cease that type of conduct. The Company reviewed the sign-up sheet incident and the lunchroom comments. It concluded that the Grievant had violated several work rules.
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> * * *
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> The Union asserts that writing on the sign-up sheets is similar to other behavior that occurs in the plant. The Union cites the use of vulgar language, the presence of graffiti, and offensive cartoons as examples of similar conduct.
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> The behaviors cited by the Union may well be part of the culture of the plant. However, the behavior of the Grievant was quite different. He attempted to interfere with management's ability to operate the plant. His conduct was intended to discourage employees from signing up for overtime. If Grievant's efforts were successful, the Company would have been unable to obtain employees to work overtime.
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> * * *
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> The new overtime policy did not directly affect the Grievant. He was not required to work overtime. This fact that the policy did not affect him directly makes his conduct more offensive. Not only did Grievant not want to work overtime, he also wanted to keep others from working overtime.
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> * * *
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> In order to establish that an employee has willfully violated a work order, the order itself must be clear and concise. Grievant was told to stop "this sort of conduct" and was told not to "take matters into your own hands." The ambiguity of the order makes it difficult to conclude that there was a deliberate violation.
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> * * *

Grievant engaged in unacceptable behavior in the lunchroom on October 8, 2013, by continuing to vocalize his opinion that other employees who worked overtime were company whores. However, the misconduct was not flagrant enough to conclude that the Grievant directly violated the work order. Grievant made ill-advised remarks during a lunchroom conversation. However, he could not reasonably have known that he could be terminated for his lunchroom behavior.

The arbitrator's analysis failed to recognize a key fact, that when Williams urged other employees to boycott the overtime procedure he was engaged in activity protected by the Act. The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *Kvaerner Philadelphia Shipyard*, above, citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Meyers Industries (II)*, 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991).[5]

The arbitrator also did not recognize that Williams' objective, getting employees to boycott the unilaterally-imposed overtime system, was legitimate. Employees who concertedly refuse to work voluntary overtime are engaged in activity protected by the Act. *Security Walls, LLC*, 356 NLRB No 87 (2011). Accordingly, when an employee rallies other employees to engage in such a boycott, that also constitutes protected activity.[6]

The arbitrator drew no distinction between individual activity and concerted activity by employees for their mutual aid or protection. His observation that the "new overtime policy did not directly affect the Grievant" ignores the reason why Williams felt so strongly that the new overtime system was illegitimate: The employees, through their Union, had not agreed to it. The arbitrator did not appear to understand that the unilaterally-imposed policy did indeed affect Williams directly because, as a bargaining unit employee, he had a substantial interest in his Union's ability to represent him, an ability diminished by the Respondent's unilateral action.

The concept that one employee may speak for other employees—and that the Act protects an employee who voices the complaints of other employees—totally escaped the arbitrator. Instead of appreciating Williams' right to try to persuade other employees to boycott the overtime sheet, the arbitrator criticized him, in effect, for meddling in someone else's business: "This fact that the policy did not affect him directly makes his conduct more offensive."

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[5] Moreover, as a general principle, employee discussions about terms and conditions of employment enjoy the Act's protection. *Ellison Media Co*., 344 NLRB 1112 (2005). Although there are exceptions to this principle, none is apparent from the arbitrator's decision.

[6] Certainly, an employee engaged in protected activity can commit misconduct so egregious it forfeits the Act's protection. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), *PPG Industries, Inc.*, 337 NLRB 1247 (2002), *Felix Industries*, 339 NLRB 195 (2003), *Trus Joist MacMillan*, 341 NLRB 369 (2004), *Winston Salem Journal*, 341 NLRB 124 (2004), *Waste Management of Arizona*, 345 NLRB 1339 (2005), However, the arbitrator never recognized or acknowledged that Williams had engaged in any protected activity and never performed the analysis described in these cases.

The arbitrator did not distinguish means from ends. The fact that Williams defaced the Respondent's sign-up sheet did not bother the arbitrator as much as the goal Williams was trying to achieve, a totally effective boycott of the unilaterally-imposed overtime system.

Rather than recognizing that the Act protects an employee's right to advocate a boycott of a voluntary overtime system, the arbitrator treated Williams' objective as improper and warranting discipline. Thus, when the Union argued that vulgar language was common in the plant, the arbitrator answered the argument by stating that Williams did something *worse* than using such language: "His conduct was intended to discourage employees from signing up for overtime."

The arbitrator characterized Williams' advocacy of an overtime boycott as an attempt to "interfere with management's ability to operate the plant." The arbitrator observed that if Williams' "efforts were successful, the Company would have been unable to obtain employees to work overtime." However, that was a lawful objective of a number of employees who objected to the unilaterally-imposed overtime procedure.

To say that if Williams' efforts succeeded the Respondent would not be able to find employees to work overtime is like saying that if an economic strike is successful, the employer will not be able to do business as usual. Such an observation does not reflect a mind tuned to employees' Section 7 rights. Rather, it is consistent with a conclusion that the arbitrator was neither presented with nor considered the unfair labor practice issue.

The arbitration award reflects no understanding that Williams was engaged in concerted activity when expressing the goal of his group and the award demonstrates no recognition that the Act protects the right of employees, acting in concert, to seek such a goal. It also does not distinguish between proper and protected concerted activity, urging other employees to support the boycott, and improper and unprotected means, vandalizing the sign-up sheet.

An arbitration award blind to these distinctions can hardly be said to have adequately considered the statutory issue. However, there is another flaw which makes the arbitrator's decision clearly and palpably wrong.

The arbitration award required Williams, as a condition of reinstatement, to sign an agreement which, if required by an employer as a condition of employment, would violate the Act. To get his job back, Williams had to promise, in writing, that he would not "engage in any type of conduct designed to undermine the Employer's overtime procedure."

However, it is unlawful for an employer to require, as a condition of employment, that an employee promise to give up Section 7 rights.[7] An arbitral award hardly comports with the Act

[7] See e.g. *Harbor Nursing & Rehabilitation Center,* 348 NLRB No. 70 (November 3, 2006) (unlawful to require employees who had engaged in concerted protest to promise, as a condition of reinstatement, that they would not do it again); *McKesson Drug Co.*, 337 NLRB 935 (2002) (employee had been suspended for filing unfair labor practice charge and it was unlawful to condition his reinstatement on a promise not to file future charges); *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1100 (2000) (unlawful to require employees to retract their protected concerted activities or else be discharged); *Bethany Medical Center*, 328 NLRB 1094 (1999) (unlawful to require employee to waive the right to engage in a lawful walkout as a condition of rehire); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218

when its prescribed remedy is tantamount to an unfair labor practice.

In sum, I conclude that the arbitrator's decision is clearly repugnant to the Act. Therefore, deferral to it would be inappropriate.

Unfair Labor Practice Allegations

The complaint alleges only two unfair labor practices, that Respondent violated Section 8(a)(1) and (3) of the Act by suspending employee Williams on October 10, 2013, and by discharging him on October 22, 2013. Section 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). Conduct which violates Section 8(a)(3) also interferes with, restrains, and coerces employees in the exercise of Section 7 rights, in violation of Section 8(a)(1).

The General Counsel alleges that the Respondent suspended and discharged Williams because Williams had engaged in activity which the Act protects. Therefore, it is appropriate to begin this analysis by determining what parts of Williams' conduct fell within the Act's protection and what did not.

Protected Activity

Section 7 of the National Labor Relations Act gives employees a number of rights[8], including one of particular relevance here: The right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. It thus affords employees the right to discuss terms and conditions of employment. *Ellison Media Co.*, 344 NLRB 1112 (2005). Any concerted activity necessarily begins with such a discussion.

Section 7 of the Act protected not only the employees' right to discuss the new overtime procedure but also their right concertedly to refuse to work voluntary overtime. *Security Walls, LLC*, 356 NLRB 596 (2011). Clearly, they had the right to boycott the sign-up sheet.

However, the Respondent did not discharge Williams because he was unwilling to sign up for overtime. Rather, the Respondent discharged him after he wrote "whore board" on the

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(1995) enf. sub nom *Aroostook County Regional Ophthalmology Center v. NLRB*, 317 81 F.3d 209 (D.C. Cir. 1996); *KJEO-TV, Channel 47*, 310 NLRB No. 160 (1993) enfd. sub nom *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002 (9th Cir. 1995) (unlawful to condition reinstatement on employee's waiving right to file grievances in the future); *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (May 8, 2006) (unlawful to condition hire on applicant's willingness to cross picket line); *Penn Tank Lines, Inc.*, 336 NLRB 1066 (2001) (unlawful to condition reinstatement on refraining from union activities); *Pratt Towers, Inc.*, 338 NLRB 61 (2002) (conditioning employment of former strikers on their renouncing or abandoning union constituted unlawful "yellow dog" contract); *Davey Roof*ing, Inc., 341 NLRB 222 (2004) (unlawful to promise a discharged employee that if he removed his name from a union petition a company official would help him get his job back).

[8] Sec. 7 rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities. See 29 U.S.C. § 157.

overtime sign-up sheet and this action was at least one of the reasons for the Respondent's decision to terminate his employment.

The Act did not give Williams the right to deface the sign-up sheet and his doing so was unprotected. However, the General Counsel argues that it constituted relatively minor misconduct during the course of protected activities.

If an employee engages in an act of misconduct during the course of protected activity, the Board performs an analysis to determine whether the misconduct was so egregious that it stripped the employee of the Act's protection.[9] However, if the employee was not engaged in protected activity at the time of the misconduct, such an analysis is not appropriate.

Therefore, I must determine whether Williams was engaged in a course of protected concerted activity when he marked on the sign-up sheet. He was alone at the time, so he was not engaged in any obvious concerted activity. However, the Board deems certain actions concerted even if they involve only one person. It will find individual action protected where the evidence supports a finding that the concern expressed by the individual is the logical outgrowth of concerns expressed by the group. *Mike Yurosek Son, Inc.*, 306 NLRB 1037, 1038 (1992).[10]

The Act likewise protects an individual employee's action when it amounts to a continuation of a group's concerted activity. *Beverly Enterprises*, 326 NLRB 153 (1998). Therefore, I must consider whether Williams was involved in such a continuation of the group's concerted activity when he committed the unprotected act.

It is possible that, as part of their boycott strategy, employees opposed to the overtime procedure tried to shame other employees into refraining from signing the sheet. The record falls short of establishing that the opponents used this tactic, but leaves open that possibility.

If an employee who opposed the overtime procedure tried to convince another employee to join the boycott, the conversation would constitute protected activity. Under some circumstances, of course, it could lose the Act's protection, for example, if the "persuasion" included a credible threat of serious bodily harm. However, the advocacy would not become unprotected simply because the advocate said that signing the sheet would be shameful.

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[9] The analytical framework varies, depending on the type of protected activity. The Board applies somewhat different tests, depending on whether the misconduct occurred on a picket line, *E. W. Grobbel Sons, Inc.*, 322 NLRB 304 (1996) (applying *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964)), or in a grievance meeting or other workplace conversation between employee and supervisor, *Atlantic Steel Co.*, 245 NLRB 814 (1979), or in some other circumstance, such as a posting on Facebook. *Pier Sixty, LLC*, 362 NLRB No. 59 (2015). Although the criteria differ depending on the setting, the question to be answered remains the same: Was the misconduct of such a nature that it forfeited the Act's protection?

[10] Similarly, see *Plumbers Local 412*, 328 NLRB 1079 (1999) in which the Board adopted the judge's decision, which stated: "An individual employee acting with or on the authority of other employees and not solely on his or her own behalf is engaged in concerted activity. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand *Meyers Industries (Meyers II)*, 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Moreover, concerted activity encompasses an individual employee seeking to initiate or to induce or prepare for group action as well as individual employees bringing group complaints to management. Meyers II, 281 NLRB at 887."

Was Williams trying to discourage employees by shaming them when he wrote "whore board" on the sign-up sheet? His testimony does not establish such a motive. He simply said that he did it to protest the unilaterally-imposed overtime procedure. It would be speculative to conclude that Williams was trying to dissuade employees from signing the sheet by shaming them.

However, in *Mike Yurosek Son, Inc.*, above, the Board spoke in terms of an individual *expressing* the group's concerns, not in terms of acting in accordance with some group strategy. Based on the testimony of Williams and another employee, Michael Matheny, which I credit, I find that employees opposed to the new overtime procedure often expressed their opposition by calling the sign-up sheet a "whore board." So, Williams certainly was expressing a group concern when he wrote those words on the sheet.

However, this expression of the group's concern was by an act of vandalism which was unprotected. Williams was not expressing the group's concern by lawful means before or after the unprotected act. He was not then otherwise engaged in any protected activity. Therefore, the unprotected act cannot be considered misconduct *in the course of* protected activity.

In other words, I conclude that an unprotected act cannot create a "course of protected activity." There has to be some ongoing truly protected activity to create such a course.

This conclusion accords with the Board's holding in *United Artists Theatre*, 277 NLRB 115, 128 (1985). In that case, the Board affirmed the relevant part of the judge's decision, which stated: "My conclusion turns on the proposition that the writing of graffiti or defacing of the Employer's property as a means of the propagation of slogans is under no circumstances a protected activity and therefore, at the threshold, the conduct is disassociated from Section 7 activity and is clearly unlike misconduct occurring during the course of protected activity." *United Artists Theatre*, 277 NLRB at 128.

Because I conclude that Williams' action—writing "whore board" on the sign-up sheet—was not misconduct occurring during the course of protected activity, it is not appropriate to analyze the facts using a framework such as that used in *Atlantic Steel*, above, or *Pier Sixty, LLC*, above.

If the Respondent discharged Williams *only* because of the graffiti he wrote on the sign-up sheet, then it did not violate the Act. The analysis could end at this point. However, it is not clear that the Respondent discharged Williams only for writing on the sign-up sheet.

Reasons for Discharge

When the Respondent suspended Williams on October 10, 2013, it recorded the action on an "Employee Formal Counseling Notice" which stated:

> Mr. Williams willfully and deliberately engaged in insulting and harassing conduct pm on the job. The company will not tolerate conduct of this kind. The Ravenswood Plant has a policy to ensure a workplace free of any kind of harassment.

The notice provided no further description of the "insulting or harassing conduct," an October 22, 2013 letter notifying Williams of his discharge also offered no explanation.

Williams admittedly wrote the words "whore board" on the sign-up sheet, and that conduct certainly could be called "insulting or harassing." But did Williams do anything else which fit that description? The record does not establish that Williams did any other specific act which could be called "insulting" or "harassing."

Respondent's managers shed little light on their reasons for discharging Williams. Unit Manager Timothy Domico testified as follows:

> Q. Would you tell us again from your perspective and as a decision maker why the Company ultimately decided to terminate Mr. Williams?
> A. First of all, he didn't do what he did, okay, and so--and he really showed really no desire or--just showed no remorse, and the behavior wasn't going to change. It was going to continue to be how he was moving forward long term, so we didn't see that Constellium should do that.

Domico did not explain what "behavior" of Williams "wasn't going to change." Presumably, it was something beyond writing on the sign-up sheet, which Williams only did once and promised not to repeat.

Maintenance and Engineering Manager Mark Harmison testified that at one point, one of the supervisors under him reported that he had received a complaint from an employee, Rob Watson. However, neither the name "Rob Watson" nor "Robert Watson" appears on the overtime sign-up sheet. The sheet does list a "Robert Lawson" and a "Lewis Watson," both of whom had indicated on that sheet a willingness to work overtime,

Thus, both Lawson and Watson were not participating in the boycott of overtime and, conceivably, might have been subjected to some pressure from those who favored the boycott. From the testimony Harmison gave immediately before referring to "Rob Watson," I believe it likely that he meant to say "Rob Lawson" but inadvertently said "Watson" instead of "Lawson." However, I cannot be totally sure that was what happened.

It appears that Harmison did not speak directly with the employee about the matter, but instead received information from a supervisor, Ron Adams, who did not testify. Accordingly, the portion of Harmison's testimony quoted below amounts to hearsay and part of it is hearsay upon hearsay. Therefore, I do not rely on it for the truth of the matter asserted but only to reflect what Harmison believed at the time management made the decision to discharge Williams:

> Q. And what did Mr. Adams tell you?
> A. Ron Adams came to me, and he said that Rob reported to him that there was some behavior going on in the plant that was directed to him.
>
> Q. And by Rob, you mean?
> A. Rob Watson.

Q. Okay.
A. I asked him what kind of behavior. He said that Rob had told him that he was getting notes in his personal effects, in his toolbox, in his locker. He didn't know where they were coming from. They were just leaving notes. He would on occasion find tools missing out of his personal stuff. He would -- in the performance of the job, at times he would drive a buggy, one of the buggies I had described, and if he would have to go into the basement under the mill, he'd obviously park the buggy and walk down the steps, and at times, he'd come up out of the basement, and the buggy would be missing. Somebody would take it and go somewhere with it. So there were things directed to him. That's about the extent of it I heard Mr. Adams explain. I said, okay, you need to keep an eye out for these things going on. You need to be extra vigilant, that we don't tolerate any kind of behavior that could be considered as harassment or intimidation. And I also communicated the same thing to the rest of the foremen. We needed to ramp it up a little.

This testimony gives a clue as to what kinds of acts management considered to be "harassment" but it doesn't mention Williams at all. It does not suggest that management believed that Williams was involved in the "harassment." However, when managers later learned that Williams had written "whore board" on the sign-up sheet, his willingness to deface the sheet may have led them to suspect he was involved in such other mischief as Adams had described.

After the discovery that someone had written "whore board" on the sign-up sheet, management conducted an investigation, interviewing various maintenance employees one by one. Harmison testified that 3 employees had complaints. These employees were Robert Lawson, Tim Snodgrass and Lewis Watson, the same employees who had marked the sign-up sheet to indicate their willingness to work overtime. None of the 3 testified in this proceeding.

According to Harmison, Lawson, and Snodgrass told him they felt offended. That is hardly surprising, considering that they had signed up for overtime on the same sheet now labeled "whore board."

However, Harmison's description of the interview with the third employee, Watson, was more dramatic. Harmison testified:

Q. Did any point in time -- why don't you describe for us what the employees told you in those meetings?
A. Yeah. Like I say, we interviewed several employees. A few said that they didn't know anything. They didn't see it. Several had very compelling things to say, particularly Louie Watson. You can see on the signup sheet, Louis Watson, he signed up for every day of the week. He was another individual that would work a lot of overtime. We asked Louis kind of, you know, what's your take, what's your feel? Mr. Watson became very emotional. He broke down, sobbing, crying, had a very hard time catching his breath. This went on for several minutes, to the point where we were sort of concerned for his well-being. He had to get up, leave, go get a drink, and come back and compose himself. He said he was emotional because of

the way this was making him feel.

Q. And when you say this, what are you referring to?
A. The intimidation, the harassment, the insulting language.

As noted above, Watson did not testify. Therefore, it is not possible to determine whether his emotional reaction resulted solely from seeing the words "whore board" on the sign-up sheet or whether he was upset because of other things as well.

Harmison also interviewed Williams, who ultimately admitted writing the words "whore board" on the sign-up sheet. However, Harmison testified, Williams did not apologize:

Q. Did he say anything to acknowledge that what he had done was wrong?
A. He -- no, in fact, Mr. Williams said he didn't believe that it was wrong. At that time, we kind of said, okay, timeout. Just so we're all clear, it is wrong, and it's not tolerated, and to be clear, it means to stop, no more. We told Mr. Williams that we understand that you may object to the policy, you may object in principle that this is not agreed to, a joint agreement. We reminded Mr. Williams that if he has an objection to the policy, that he has contractual means to rectify his perceived wrongdoing. He can file a grievance and go through the normal course. We told Mr. Williams that if he has an objection, what he doesn't have the option to do is take matters into his own hands and inflict his own form of justice, I'll say.

Q. And when you say inflict his own form of justice, what do you mean?
A. Through either harassment, through either intimidation, through singling out employees that may not have his same view. He can't -- he doesn't have the right to do this.

Harmison did not explain what he meant by "harassment" or "intimidation."

According to Harmison, the day after this meeting with Williams, he learned from a supervisor that Lawson wanted to speak with him. He testified that Lawson came to his office:

Q. BY MR. BORDONI: Would you describe for us your meeting with Mr. Lawson and what you told him?
A. Yes. Okay. So Mr. Lawson said the behavior hasn't changed. He said honestly it's gotten 100 times worse, is what he told me. I said in what regard; tell me what's going on. And he said that more things are being said in his presence now. He said it's getting louder. It's becoming more direct. He said there was some employees that were -- said things like this whole thing wouldn't be happening if some people weren't so damn sensitive. So I -- it was a short meeting, only a few minutes. I said, would you mind writing this down, putting it in an e-mail, write it down and give it to me, handwrite it, and he said he would. However, I never received anything from Mr. Lawson in that regard.

As noted above, Lawson did not testify so it remains unclear whether he actually told Harmison that "more things are being said in his presence" and, if he did, what he meant. However, it is clear that the Respondent discharged Williams in part for what Williams said on this occasion in the lunch room. Martin J. Lucki, who was Respondent's director of human resources at this time, gave the following explanation for the decision to discharge Williams:

> So in addition to writing this during the investigation, Mr. Williams was sat down, did admit to it. It was explained to him that this needed to stop immediately, this type of action. The very next day he went out and continued this type of behavior in the lunchroom by making comments loud enough that Mr. Lawson could have heard and upset Mr. Lawson. So after advising him to cease his behavior, he continued his behavior, and I had no belief that he would stop it anytime.

This incident in the break room supposedly took place on October 9, 2013, the day before the Respondent suspended Williams with intent to discharge him. However, it should be noted that no evidence establishes that Williams made any comments in the break room, or even that he was in the break room, on this date.

When Harmison testified concern what Lawson had told him, I received this hearsay only for the limited purpose of ascertaining what information Respondent's managers considered in deciding to discharge Williams and not for the truth of the matter asserted. Williams denied having any conversation at all with Lawson, who worked on a different shift. He also denied calling Lawson, or anyone else, an "overtime whore." Therefore, I do not find that Williams was in the break room or made the statements attributed to him.

The evidence establishes, at most, that Respondent's management believed that Williams had been in the break room and had made some sort of statement which offended Lawson. However, if Lawson attributed any specific words to Williams, Harmison's testimony does not reveal what they were.

The record leaves open the possibility that the Respondent believed Williams had been advocating a boycott of the overtime procedure, and doing so loudly, on this occasion. If so, such advocacy by Williams might constitute concerted activity protected by the Act. However, were that the case, it would have been in the General Counsel's interest to develop exactly what Williams had said.

The most obvious witness to testify about what Williams had said was Williams himself and the General Counsel did recall him to the stand, as a rebuttal witness, after the Respondent's witnesses had testified. However, Williams' testimony does not establish that he had made any statement at all which might constitute protected concerted activity. To the contrary, Williams denied even having a conversation with Lawson. Crediting Williams,[11] I find that he did not behave in the manner that Lawson reportedly described to Harmison.

[11] Based on my observations, I conclude that Williams was a reliable witness. Moreover, in this instance, the conflict to be resolved was between Williams' sworn testimony about what he did and hearsay about what Lawson said Williams did. Additionally, the hearsay was vague.

The record does not establish that Williams engaged in any misconduct except for writing the words "whore board" on the sign-up sheet and I find that he did not. However, the record also does not establish any specific instance in which Williams was engaged in protected activity.

Williams testified that he spoke with other employees about the new overtime system and that the employees agreed upon a boycott of the system. Crediting this testimony, I find that Williams did have such discussions, which clearly constituted activity protected by the Act. However, the record does not establish when these conversations took place or that the Respondent knew about Williams' participation in any particular conversation.

What the Respondent "knew," or rather, what the Respondent's managers thought they knew, was that Williams was in the break room on October 9, 2013, and made some remark which offended Lawson. However, crediting Williams' denial, I find that he did not make any such statement.

If the General Counsel had proven that Williams had engaged in a particular instance of protected activity, and if the Respondent had believed, mistakenly but in good faith, that Williams had committed misconduct during the course of that protected activity, then it would be appropriate to follow the Board's precedents grounded in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). However, the *Burnup & Sims* rationale does not apply when employees are not engaged in protected activity. Thus, an employer does not violate the Act by terminating employees based on a mistaken belief that they engaged in misconduct if their actions did not arise out of any protected activity. *White Electrical Construction Co.*, 345 NLRB 1095 (2005), citing *Yuker Construction Co.*, 335 NLRB 1072, 1073 (2001).

In this case, the credited evidence does not support a conclusion that Williams committed misconduct while in the course of protected activity. Therefore, under the theory advanced by the General Counsel, I do not find a violation of the Act.

Alternate Wright Line Analysis

The General Counsel urges an *Atlantic Steel* analysis and does not advocate that the facts be examined under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, because I have concluded that the *Atlantic Steel* framework is not appropriate, a brief look at the facts through the *Wright Line* lens may be informative.

Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union or protected concerted activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso*

Electric Co., 350 NLRB 151 (2007).

With respect to the first factor, the record does not establish any particular instance when Williams engaged in protected concerted activity, but it appears very likely that he did. He emphatically supported the boycott of the overtime system unilaterally imposed by Respondent. His testimony leaves no doubt that he believed this system improper because the employees, through their Union, had not agreed to it. From his testimony, I did not get the impression that he would keep his opinion a secret.

With respect to the second factor, employer knowledge, the evidence may fall short of establishing that the Respondent knew, when it decided to discharge Williams, of any specific instances when he advocated the boycott to other employees. However, two days before Respondent's decision to suspend Williams, he admitted to managers that he had written the words "whore board" on the sign-up sheet. This activity was unprotected but it demonstrated how strongly he felt. The Respondent could well conclude that someone who felt that strongly would also make his views known in conversations with other employees.

Therefore, for the sake of analysis, I will assume that the record establishes the first two of the elements which the General Counsel must prove. However, no evidence proves the third factor, that the Respondent harbored animus against the boycott or its supporters. Accordingly, were I to examine the facts using the *Wright Line* framework, I would conclude that the General Counsel had failed to make the required initial showing.

In sum, I conclude that credited evidence fails to establish the violations alleged in the Complaint, and therefore recommend that it be dismissed.

Conclusions of Law

1. The Respondent, Constellium Rolled Products Ravenswood, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5668, is a labor organization within the meaning of Section 2(5) of the Act.

3. It is not appropriate to defer to the September 16, 2014 award of Arbitrator Charles W. Kohler.

4. The Respondent did not violate the Act in any manner alleged in the complaint.

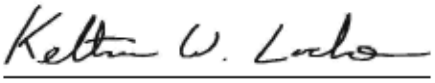
On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[12]

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated Washington, D.C. September 29, 2016



Keltner W. Locke
Administrative Law Judge